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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Naturally Scientific, Inc.

Serial No. 76404308

Evelyn M. Sommer, Esq. for Naturally Scientific, Inc.

Brian D. Brown, Trademark Examining Attorney, Law Office 105
(Thomas G. Howell, Managing Attorney).

Before Simms, Walters and Chapman, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Naturally Scientific, Inc. has filed an application to register the mark LIQUID POWER SHOTS on the Principal Register for "nutritional and dietary supplements," in International Class 5.¹ The application includes a disclaimer of LIQUID apart from the mark as a whole.

The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act,

¹ Serial No. 76404308, filed May 6, 2002, based on use in commerce, alleging first use and use in commerce as of July 29, 1999.

15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark shown below, previously registered for "sublingual² vitamin and herbal supplements,"³ that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.



Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he

² We take judicial notice of the definition of "sublingual" in *The American Heritage Dictionary* (2nd college edition, 1985) as "adj. situated beneath or on the underside of the tongue."

³ Registration No. 1,613,497 issued September 18, 1990, to Basic Organics, Inc., in International Class 5. The registration includes a disclaimer of LIQUID apart from the mark as a whole. The registration contains the statement that the mark is lined for the color yellow or gold. [Sections 8 (six and ten year) and 15 affidavits accepted and acknowledged, respectively; renewed.]

fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The factors deemed pertinent in this proceeding are discussed below.

The Examining Attorney contends that the overall commercial impressions of the two marks are "quite similar" because they both contain the identical terms LIQUID and POWER in the same order; that the additional term SHOTS at the end of applicant's mark is not sufficient to distinguish the marks; and that the stylized lettering and color in registrant's mark do not distinguish the marks because applicant's mark is in a typed format which could encompass any design elements, including those in the registered mark. The Examining Attorney further contends that the goods are related because both are supplements for human consumption; that the channels of trade for the respective broadly identified goods is likely to be the same, as is the class of purchasers; and that the products are relatively inexpensive and likely to be purchased on impulse.

Applicant contends that the marks are different because of the addition of the word SHOTS to applicant's mark and the design element in the registered mark; that the term SHOTS is significant and connotes "a directed forceful discharge"; and that the marks must be considered in their entireties and the Examining Attorney has improperly dissected the marks. Applicant further contends that the goods are different because the labels and modes of administration are different, and applicant's goods are intended to be purchased and used by "body builders, weight lifters and serious athletes" who are likely to exercise care in making their purchase.

We turn, first, to consideration of the goods involved in this case. We note that the question of likelihood of confusion in a case before the Board must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need

not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each party's goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

Clearly, applicant's "nutritional supplements" encompasses, at least, registrant's "vitamin supplements." Applicant's identification of goods also encompasses all possible means of delivery for such supplements, including "sublingual." Thus, the goods are very closely related and overlapping. Applicant's attempts to distinguish the products based on actual use are inapposite because, as noted herein, we must consider the broadly recited identification of goods.

We turn now to the question of whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side

comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The first two words of applicant's three-word mark are identical to the words comprising the registered mark. Contrary to applicant's allegations, the design element of the registered mark is not sufficient to distinguish the marks, nor is the additional term SHOTS. The design element in the registered mark is merely a stylization of the letters, with the word POWER appearing in color and in larger font than the word LIQUID. However, it is the words themselves that dominate the commercial impression of the registered mark. When both words and a design comprise the mark, the words are normally accorded greater weight because

the words are likely to make an impression upon purchasers that would be remembered by them and would be used by them to request the goods and/or services. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 USPQ 461, 462 (TTAB 1985). See also: *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

Further, applicant's mark appears in block letters and, therefore, may be used in any reasonable design format. See *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ("[T]he argument concerning a difference in type style is not viable where one party asserts rights in no particular display.")

Finally, applicant's mark encompasses the wording of registrant's mark, and simply adds, at the end, the word SHOTS. Rather than distinguishing the marks, the term SHOTS in applicant's mark is likely to be perceived by customers familiar with registrant's products as indicating a special line of registrant's products.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, LIQUID POWER SHOTS, and registrant's stylized mark, LIQUID POWER, their contemporaneous use on the closely

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related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is affirmed.